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In the Supreme Court of the United States

OCTOBER TERM, 1905

EAST CENTRAL EUREKA MINING COMPANY,
JAMES TOMAN and ELIZA A. TOMAN,
Plaintiffs in Error,

vs.

CENTRAL EUREKA MINING COMPANY,
Defendant in Error.

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EAST CENTRAL EUREKA MINING COMPANY, JAMES TOMAN, AND ELIZA A. TOMAN,
Plaintiffs in Error,
vs.
CENTRAL EUREKA MINING COMPANY,
Defendant in Error.
No. 44.

BRIEF FOR PLAINTIFFS IN ERROR.

I.

STATEMENT OF FACTS AS TO EXTRA LATERAL RIGHTS.

This writ of error to the Supreme Court of California brings up a record showing the bill filed by defendant in error, holding under a mineral patent, against this plaintiff the holder of an agricultural

patent to quiet title to a mineral ledge underlying the farm of plaintiffs.

This ledge, having its apex in the surface of the land patented to defendant in error, leaves the surface in passing through the side lines of that surface projected vertically downwards, enters the adjoining farm below the surface of the agriculaural patent at the depth of 1094.75 feet, where the shaft crosses the vertical line. (See folio 131 of the record.)

As the holder of the agricultural patent thereby acquired everything from the surface to the center, the defendant in error was bound to prove an extralateral right to the ledge superior to the title held by plaintiff under his patent.

We insist that the case made by this record does not establish an extralateral right in the miner superior to the title made by the agricultural patent, and the judgment below must be reversed and the bill should be dismissed.

The end lines of the mineral patent were not parallel, nor restricted to the dimensions prescribed by the Act of May, 1872, under which the patent issued.

The power of the Land Office is conferred by Acts of Congress and patents in excess of its jurisdiction are void. The record shows that the survey of the mineral patent was not approved until June 4, 1872. (See certificate of J. H. Hardenberg, Surveyor-General, California, page 59 of the record, folio 129,

attached to the diagram opposite page 58). At this date the Surveyor-General had no authority to approve a survey with end lines which were not parallel, or, if he did so, the patent based on such survey carried no extralateral right.

On October 11, 1872, the Register and Receiver gave an opinion that the applicant for the mineral patent should be permitted to enter and pay for said Quartz Gold mining claim. (Folio 126-7-9 of the record.) And at folio 68 is the receipt for the money paid on the purchase, dated October 11, 1872.

We claim this to be the inception of any right of defendant in error. See *Davis* vs. *Wiebold,* 139 U. S., 239, where Judge Field says:

> "According to *Deffenbach* vs. *Hock,* 115 U. S., 392, the patent to a mine relates back to the entry and payment of the price to the Government, and when the patent subsequently issued it took effect at the date of the entry, that being the earliest evidence of any movement for acquisition of any title from the Government."

It is suggested by our opponents, that prior to this time, by virtue of some location by grantors of defendant in error, some rights were confirmed to him by the Act of 1872; that such locations conferred a right not capable of being taken away by the repeal of the Act of 1866, known as Lode and Water Act. Manifestly, the burden is on defendant of proving

up his superior equity which arose from his locations alone.

It is suggested that the patent also recites that it is issued under the Act of 1866, and that Act did not require that end lines should be parallel to give extralateral rights, and that under that Act the patent might have been issued to the Summit Quartz Mine alone. This, however, was not done. The attempt was to grant not only the ledge located on, but also all other ledges which had apexes within the surface boundaries, together with their extralateral rights. (Record, folio 60.)

We suggest that the same rule must obtain in regard to all the extralateral rights of all veins. (See folios 60-61 of the record.)

In *Walroth* vs.*Champion Mining Co.,* 63 Fed., 578, in speaking of this rule, the Court says:

> "This is the rule that applies to all locations made after the Act of 1872, as it ought not to be presumed that Congress by its grant to prior locators intended to give greater rights to them than were given and granted to subsequent locators under the same Act. The *same end lines bound all extralateral rights."* (Page 558).

II.

STATEMENT OF FACTS AS TO DEED.

Prior to October 23, 1897, the Central Eureka Mining Company, defendant in eror, and Tomans,

plaintiffs in error, came to an agreement, in pursuance of which the Central Eureka Mining Company executed and delivered to Tomans a quit-claim deed of the premises in dispute. (Folio 139 of the record.) (Deed at folio 161.) This deed grants to Tomans

> "That portion of Sections Eight (8) and Seventeen (17) Township Six (6) North, Range Eleven (11) East, Mount Diablo Base and Meridian, lying north of the center of that certain wagon road extending between the town of Ione and Volcano and known as the Ione and Volcano wagon road, and lying east of that certain patented mining ground known as the Summit Quartz Mine, and also east of that certain patented mining ground known as the Amador Consolidated Mine."

The map showing the premises covered by the deed is found opposite page 25 of the record, and also appears on page 57.

The Supreme Court of California had before it the identical record now before you, but reached the conclusion that this deed did not cover the premises in controversy and did not "purport to convey any " portion of the mining ground of the plaintiff." The reason given was as follows:

> "Admittedly, the description in the deed DOES INCLUDE THE LAND OF THE TOMANS adjoining plaintiff's claim, through which the vein in controversy has its dip. Defendants' relying upon the well-recognized prin-

ciple that a conveyance of land, in the absence of express reservation, carries not only the surface of the earth, but everything under and over it, including the minerals therein contained, claim that the effect of this deed was to convey to defendants the portion of the vein here in dispute. As the plaintiff was at the date of the deed the owner of such portion of said vein, such must be held to be the effect of the quitclaim deed if the description in the deed includes the same. As has already been seen, the deed purported to convey only such portions of the sections of land as lay east of 'that certain patented mining ground 'known as the Summit Quartz Mine and also 'east of that certain patented mining ground 'known as the Amador Consolidated Mine.' It is only by construing this language as referring exclusively to the *lines of the surface location* that defendants' contention that this description included the vein can be upheld."

(The deed itself is found at folio 161 of the record, and is pleaded in the answer.)

"As a matter of fact, the vein under the Toman surface was, so far as it lay between the converging end line planes of plaintiff's claim, as much a part of the Summit Quartz Mine, and of the patented mining ground known as such mine, as was the land within the surface lines of plaintiff's location. It has been by the United States Government severed from the Toman land, and granted to plaintiff's predecessor, as an integral part of the Summit Quartz Mine, and the agricultural patents of defendants' predecessors contained a coresponding limitation upon the estate granted to them. Unquestionably it would have been conveyed by any instrument purport-

ing to grant the SUMMIT QUARTZ MINING CLAIM or the Summit Quartz mining ground, for it was part and parcel thereof. The reasons which would require us to hold that the vein was conveyed by a deed purporting to convey the Summit Quartz mining claim or mining ground are equally applicable to a deed purporting to convey only lands lying east of such claim or ground, and forbid the conclusion that it was intended to convey any part of the mining claim or ground itself. * * * * * We have no such deed here, but one which, in terms, limits its operation to such portions of the designated sections as lie east of the 'mining ground' of plaintiff. Taking into consideration simply the character of plaintiff's property, we are of the opinion that the deed did not purport to convey any portion of any vein that had its apex within the surface lines of plaintiff's location, so far as it lay between the converging end lines of plaintiff's claim."

Had the case before the Court been one to reform this deed, these reasons, if given for reforming it, might have been pertinent. According to the theory of the Court, the property described in the deed was such portions of Sections 8 and 17 as lay to the east of the surface boundary line between the two patents beyond the end of the ledge to which the miner claimed his extralateral right. Until we reached the end of that ledge we do not reach the end of the mining ground of defendant in error. So that, although the deed gives surface boundaries, those surface boundaries are not to be

regarded but simply, and first, the termination of the ledge. If the ledge went on east across Tomans' ranch and penetrated to sections beyond the surface boundary of that ranch, as accords with their theory the deed could never be located, and the board of directors of the mine were enacting the farce of accepting back from Tomans their notes and presenting them in return with a worthless deed, which could not be located, and to property also to which they had no title.

The proposition stated by the Supreme Court could not arise on this bill, for no issues have been framed to reform the deed. It must be taken as it is and located according to its surface boundaries, and the true rule is the converse to that stated by the Supreme Court of California. The true rule is that everything is granted and passes, unless there are specific reservations. The grant or deed is a quit-claim of land which covered all metals, and has from Blackstone's time until now.

Again:

Whether this deed quit-claims the vein or not, it establishes that the parties agreed upon a line between their respective properties, on the surface and this line on the east was the boundary line on the surface of the Summit Quartz mine, as described on the surface. After the execution of this deed defendant in error is estopped from claiming anything to the east of the surface conveyed.

If we are correct, that, for the want of parallelism of end lines, defendant in error had no extra-lateral right, then he had no mining ground beneath the surface of Tomans' ranch, and necessarily was estopped by its deed from claiming such ledge.

POINT I.

DEFENDANT IN ERROR ACQUIRED NO TITLE UNDER ACT OF MAY, 1872, (Rev. Stat., Sec. 2330) BECAUSE THE END LINES OF PATENT WERE NOT PARALLEL.

Iron Silver M. Co. vs. *Elgin Mining & S. Co.,* 118 U. S., 196;
Del Monte M. & M. Co. vs. *Last Chance M. & M. Co.,* 171 U. S., 66.

In the last case the Court said regarding the subject of end lines:

> "The question in the courts is not, What is equity? but, What saith the statute? Thus, for instance, there is no inherent necessity that the end lines of a mining claim should be parallel, yet the statute has so specifically prescribed. (Sec. 2320.) It is not within the province of the Court to ignore such provision, and hold that a locator, failing to comply with its terms has all the rights, extralateral and otherwise, which he would have been entitled to if he had complied, and so it has been adjudged."

The contention of the defendants is, as we understand it, that the location of the mine was made prior to 1872 and under the law of 1866; that proceedings were pending in the land office looking to a patent on the 10th day of May, 1872; that whatever rights the locator had acquired at that point of time were reserved to him by the act; and that the patent, although issued under the law of 1872, confirmed the existing rights of the locator under the Act of 1866, and gave to him those rights as well as the rights mentioned in the patent itself; that under the law of 1866 the end lines of claims were not required to be parallel to give extralateral rights. Therefore the present holders, successors in interest to the patentee, have extralateral rights, although end lines of the claim, as patented, are not parallel. To this contention defendants answer.

1ST—THAT BY ACCEPTING A PATENT GRANTING ALL RIGHTS POSSIBLE UNDER THE LAW OF 1872, THE PATENTEE WAIVED AND RENOUNCED ALL THE RIGHTS IN CONFLICT WITH THE PROVISIONS OF THE ACT UNDER WHICH HIS PATENT ISSUED, SO THAT HE RENOUNCED THE RIGHT TO RETAIN CONVERGING END LINES AND OBTAIN A PATENT WHICH SHOULD GIVE EXTRALATERAL RIGHTS ON THE VEIN.

The above proposition was decided in the case of *New Dunderberg M. Co.* vs. *Old,* 79 Fed. Rep., p. , in which it is said—

"The claim of his grantee now is that it can renounce this location and the limitations of the law and the patent upon which it is based and follow the lode, wherever it leads, as the discoverer might have done when he first found it and before he located his first claim to the surface at all. It bases this claim upon the provision of Section 9 of the act of May 10th, 1872 (17 Stat. 91 C. 152), that the repeal of Sections 1, 2, 3, 4 and 6 of the Act of July 26, 1866, page 262, 14 Stat. 461, should not affect existing rights. But it was not the repeal of these Sections of the Act of 1866 that affected the rights of the owner of the Dunderberg lode. That repeal did not deprive him of any right he had to follow his lode into the Frostly claim. It was his location, entry and patent to his claim which did this," etc.

"The act of 1872 required the applicant for a patent to locate his claim on the surface of the ground as a condition precedent to its issue, and it declared what rights he should acquire thereby for the express purpose of defining, fixing and allowing his claims and his rights. Under that act the location of a mining claim on the surface of the ground and its entry for patent is a notice to the Government and the public that the owner claims all the exclusive rights and privileges granted by the act; but it is no less a notice and a legal notice that he renounces and abandons to the Government all other rights and privileges pertaining to his discovery of the lode for which he asks the patent. It would work manifest injustice to permit him who has located and excluded all others from a claim of the full size allowed by the acts of Congress, and from all veins whose apexes lay within its surface, to follow the lode upon the discovery of which that claim was based at right angles to his location and

without its side lines for a distance equal to the length of his claim. In our opinion the acts of 1866 and 1872 conferred no such privilege. A claimant who discovered and located a lode mining claim under the act of 1866 RENOUNCES and ABANDONS ALL RIGHTS and privileges to follow his lode on its course beyond the exterior lines of his patented claim, when he LOCATES it upon the surface of the ground, ENTERS it, and ACCEPTS a patent for it under the act of 1872. * * *

"Since the side lines of the Dunderberg claim crossed the course of the strike of the vein, they constitute end lines; and, under the patent to it, the owner of that claim was without right to the possession of that lode outside of those lines after he obtained his patent in 1873. *Mining Co.* vs. *Tarbet,* 98 U. S., 463; *Iron Silver Mining Company* vs. *Elgin M. & S. Co.,* 118 U. S. 196, 207; *King* vs. *Mining Co.,* 152 U. S., 222-228."

The location of the Dunderberg vein was made in 1867 (page 601). The patent was issued September 16, 1873. The Court says:

"Conceding, but not deciding, that the locator of the Dunderberg claim, in 1867, then had the right under the act of 1866, to follow the Dunderberg lode in any direction from his discovery shaft in which it lay, he RENOUNCED that RIGHT when he availed himself of the benefit of the act of 1872, and ACCEPTED HIS PATENT UNDER THAT STATUTE. That act provided that he might claim a patent according to its terms, or that he might retain the rights he acquired under the act of 1866. * * *

"The patentee of the Dunderberg lode located his claim and accepted a patent for it, under the

terms of this act" (viz: the act of 1872). He located it on a tract of land which included his discovery shaft which was 3000 feet long from north to south, 70 feet long from east to west."

It is seen from this case that the acceptance of the benefits of the act of 1872, including all the mineral which lies below the surface mentioned in the patent, including all veins and mineral within the vertical planes of the surface boundaries extended downward, waives the right to follow a lode downwards beyond the vertical lines, because the law under which the patent issues prescribes that the end lines of the claim shall be parallel to give that right. In other words, the patentee cannot have *all the lodes within his surface boundaries which he did not have under the act of 1866, and in addition to that have all the benefit of the act of 1866, which, would permit him to follow the vein downwards, notwithstanding his end lines were not parallel.* He had to elect which rights he would take. He did take those given him by the act of 1872, and by accepting a patent under that act, he thereby renounced all right to any extralateral rights under the act of 1866.

If this were not true, locators of claims prior to the act of 1872 would acquire a right which other locators under the act of 1872 could not claim, and the effect of the statute would be to give to the locators, before the act of 1872 passed, greater rights

than are given to the locators after the act of 1872 was passed. And there would be no reason for conferring greater rights upon the earlier claimants than the latter. Had it been so intended, the act would have so specified. That the rights of a patentee are prescribed and limited by the law under which the patent issues; see

New Dunderberg vs. *Old*, 79 Fed., 698;
Walrath vs. *Champion*, 171 U. S., 170.

In this latter case the Court says:

> "If the same end lines which bound the estralateral rights of the Providence surface survey apply to the Contact vein and to all other veins if any are hereafter found, then no such difficulty can arise. This is the rule that applies to all *locations* made after the Act of 1872, and it ought not to be presumed that Congress by its grant to prior locators intended to give greater rights to them than were given and granted to subsequent locators under the same Act. The same end lines bound all extralateral rights." (Page 558.)

To this point the argument has been that the acceptance of a patent under the act of 1872 is a renunciation of a right to claim privileges conferred by the act of 1866 but denied under the act of 1872, for the act of 1872 denied to any claimant who took a patent under that act the right to follow the vein into adjoining territory if the end lines of the claim were not parallel. To this it might be said that by

the act of 1872 "the existing rights" of locators of mining claims, before the passage of that act, were reserved by the declaration in Section 9, that the repeal by that act of Sections 1, 2, 3, 4 and 6 of the act of 1866 should not affect existing rights, and that applications for mining claims then pending might be prosecuted to a final decision in the General Land Office. But—

POINT II.

AT THE DATE OF THE PASSAGE OF THE ACT OF 1872 THE DEFENDANT HAD ACQUIRED NO EXISTING RIGHT, UNDER THE ACT OF 1866, TO HAVE EXTRA-LATERAL RIGHTS ON A CLAIM WITH CONVERGING END LINES.

His argument assumes that he and the Land Office had taken such action that he had then secured these extralateral rights. The mere fact that he had filed an application with converging end lines would not be sufficient, because on trial in the Land Office it might be determined that he had no right whatever to the location, or that he would be obliged to alter or modify his diagram or survey.

It is necessary to further show that when the act of May 10, 1872, went into effect McAllister's survey had been approved, and his right to converging end lines had thus become an "existing right."

This assumption is wholly untrue.

On January 4th, 1872, W. L. McKim, Deputy Surveyor, surveyed out and ran the end lines of this claim.

After that the survey was "critically examined, necessary corrections and explanations" were made, and it was not until June 4th, 1872, that J. R. Hardenbergh, U. S. Surveyor-General for California, approved these converging end lines (trans., 206-207).

So, that on the 10th of May, 1872, he had no extralateral right under the act of 1866 to any specific tract.

Of course if McAllister had acquired vested rights to an extralateral right on the ledge, Congress could not take it away by repealing the act of 1866 or any part of it.

Thus it has been held that where an applicant for public land had entered his land in the Land Office and paid his money and nothing remained to complete his title but issue of a patent the delay of the Land Office or repeal of the law before patent issued could not deprive him of his "existing right." But, until he had made the payment of money his right did not attach. The settled rule is that until the legal title has passed, or the locator has acquired by payment of money some vested right the public lands are within the jurisdiction of the Land Department and Congress retains control.

See *Diffenbach* vs. *Hoch,* 115 U. S., 592, and *Davis* vs. *Wiebold,* 139 U. S., 239.

Mr. Justice Field said, in the *Yosemite Valley case,* 15 Wal., 87, citing *Frisbie* vs. *Whitney*:

> "And it was there held that under the pre-emption laws mere occupation and improvement of any portion of the public lands of the United States with a view to pre-emption, do not confer upon the settler any right in the land occupied, as against the United States, etc. * * * The power of regulation and disposition conferred upon Congress by the Constitution only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, *including the payment of the price of the land,* have been performed by the settler."

The power of the Land Department over public lands of the United States in regard to making and altering surveys is unrestricted. *Michigan Land & Lumber Co.* vs. *Rust,* 168 U. S., 594.

In the late case of *U. S.* vs. *Montana Lumber and Manf. Co.,* 25 Sup. Ct. Reporter, 367—per McKenna, J.—it was held that "the U. S. retained the "right to its timber until the land had been surveyed "and the odd numbered sections ascertained by a "*Government survey;* in other words, that notwith-"standing a Congressional grant of odd numbered "sections, the title remained in the Government un-"til it had exercised its power of survey."

So here no *rights* of locator against the Government accrued to be upheld as a vested right until the Government surveyor had made the survey and the Surveyor-General had approved it. Before that time the power of the Surveyor to make a survey in this manner so as thereby to give extralateral rights had been cut off and he was bound to survey under the act of 1872, and according to its directions: He should have made the end lines parallel. He could only survey as the act of 1872 required. His disobedient act conferred no rights to be upheld after repeal of act of 1866.

> "This jurisdiction (of the Secretary of the Interior) extends to the altering of any surveys whenever in the judgment of the department there has been error or fraud in those already made." *Cragin* vs. *Powell,* 128 U. S., 691.

The same principle applies to mineral lands also. So it was held in *Del Monte M. & M. Co.,* 171 U. S., 70.

> "By Section 2319 quoted, above the mineral deposits, which are declared to be open to exploration and purchase, are those found in lands belonging to the 'United States' etc. And such lands are the only ones open to exploration and purchase. While this is true, it is also true that *until the legal title has passed* the public lands are within the jurisdiction of the land depart-

ment, and, although equitable rights may be established, Congress retains a certain measure of control. The grant is, as is often said, in process of administration. * * * Passing to Sec. 2320, beyond the recognition of the governing force of customs and regulations and a declaration as to the extreme length and width of a mining claim, it is provided that * * * The end lines shall be parallel to each other."

On page 75, *Del Monte M. & M. Co.*

"The locator may antedate the public survey, but whether before or after them, the locator places his location where, in his judgment it will cover an underlying vein, the law requires that the end lines shall be parallel." * * *

The Court then adverts to the natural overlapping of claims and asserts the power of the land office in issuing patents to except from the location overlapping claims.

The above case also determines that in all patents issued under the Act of 1872 the end lines must be parallel.

In *Larkin* vs. *Dolly*, 53 Fed., 337: The patent was issued in 1877 upon a location made under the law of 1866. The diagram having been filed August 13, 1867, and on that day a notice was posted on the claim, that locator intended to apply for a patent. The patent issued under the law of 1872, gave patentee 252 acres of land. Defendant claimed

that patent was restricted by the law of 1872 and was good only for 300 feet on each side of the vein, while plaintiff claimed a right to all the land that the Land Department had power to give under the Act of 1866. That his "existing rights" could not be cut down by Act of 1872. That under Act of 1866 the land office had power to give all the land patented to them. But the Court said "I am of "opinion that the question as to the validity of the " patent depends on the construction to be given to " Sec. 2320 Revised Statute."

The opinion then quotes from this section and adds "after the passage of the act of which this sec- " tion forms a part, it seems very clear to my mind " that the Land Department *had no jurisdiction,* " *power or authority to issue a patent* for a quartz " lode to any surface ground *exceeding 300 feet in* " *width* on each side of the middle of the vein or " lode, and that any patent which is issued for more " than that amount of surface ground is absolutely " null and void as to the excess over 300 feet, and " can be collaterally attacked in a Court of law."

The same section of the Revised Statutes which limited the effect of the patent to a conveyance of 300 feet on each side of the ledge declared that the end lines of the claim should be parallel. The

Courts have decided that unless parallel, the claim carried no extralateral rights.

See also *Larkin* vs. *Roberts,* 54 Fed., 461;

Larkin vs. *Roberts,* 154 U. S., 507.

RESUME.

Our argument is that plaintiff can not recover because

POINT I.

(1.) The plaintiff elected to take its patent under the act of 1872, which gave no extralateral rights except on claims with parallel end-lines and plaintiff thereby abandoned all claim under the act of 1866.

POINT II.

(2.) Defendant in error acquired no "existing" extralateral right under the act of 1866 because:

(a) The survey was not approved under that act prior to May 10th, 1872, and was not final when act of 1872 went into effect;

(b) Plaintiff's grantor neither entered nor paid for the land prior to that date;

(c) The whole matter of the survey was subject to the power of Congress to determine whether

or no the end lines should be parallel in order to give extralateral rights, and Congress determined that they should be parallel before this survey was approved or the land was paid for, consequently before any existing rights had accrued under the Act of 1866.

POINT III.

(a) The deed to the Tomans' must be located by the surface boundaries therein described and not by the unknown extension of a ledge buried 1000 feet below.

(b) The deed proved an agreed surface line boundary, which extended vertically downwards.

(c) Deed an estoppel on this action.

In Oct. 1897, defendant agreed with plaintiffs Tomans to buy, and they agreed to sell some of their land (fols. 140, 141, 142, 144), and papers relating thereto were placed in escrow. There were also other obligations and contracts existing between the plaintiffs and defendants, (fol. 69).

There was also some dispute as to the proper location of Tomans' fence. Subsequently plaintiff and defendants through *their respective attorneys,* negotiated a rescission of the contract of sale, and an extinguishment of all obligations and contracts between them. Defendant agreed to pay Tomans in

settlement the sum of $750 and give to him a quit-claim deed *of the premises.* At this time defendant was insolvent, feared attachments and desired to make full settlement with Tomans and avoid also suit with him. The condition of the settlement was both payment of money and delivery of "a quit-"claim deed of all the right, title and interest of "the corporation (defendant in error) in and to the "*real* property described in said contract of sale "and particularly described as follows: That por-"tion of sections 8 and 17, township 6 north, range "11 east, Mount Diablo base and meridian, lying "north of the center of that certain wagon road ex-"tending between the town of Ione and Volcano, and "known as the Ione and Volcano Wagon Road, and "LYING EAST OF THAT CERTAIN PATENTED MINING "GROUND KNOWN AS THE SUMMIT QUARTZ MINE." (for map see exhibit A, trans., p. 13).

Long after payment of money and delivery of the deed defendant moved plaintiffs' fence easterly to the east line of the patented Summit Quartz Mine as located on the surface of the ground (fol. 160) and then entered plaintiffs' ground east of that line and removed ore underlying the land. Tomans meanwhile had conveyed some of their rights to the "EAST CENTRAL EUREKA MINING COMPANY," and the latter brought suit against defendant corporation to recover for ore taken. This suit was pending when this action was brought.

DEED OF CENTRAL EUREKA MINING COMPANY TO JAMES TOMAN AND ELIZA TOMAN, DATED DECEMBER 31ST, 1898.

We will consider: First, the effect of the words of the deed.

SECOND, the location of the premises therein described.

THIRD, whether plaintiff had any extralateral right by his mining patent.

I.

AS TO THE EFFECT OF THE WORDS OF THE DEED.

The deed reads: "By these presents does quit-"claim and release forever unto the party of the "second part, all those certain pieces of LAND." The land is described in the deed, as we have seen, as that portion of certain sections "lying east of that "certain patented mining ground known as the Sum-"mit Quartz Mine."

> "If a man grant all his land, he grants thereby all the mines of metal or other fossils, his woods, his waters, and his houses, as well as his fields and meadows."
>
> *2 Blackstone Com.*, 19.

The *Civil Code* says (Sec. 659):

"Land is the solid material of the earth whatever may be the ingredients of which it is composed, whether soil, rock or other substance."

"WHERE INDIVIDUALS CONVEY LANDS, THE MINERALS OF GOLD AND SILVER PASS UNLESS EXPRESSLY RESERVED."

Moore vs. *Shaw*, 17 Cal., page 199.

At page 224, the Court said:

"All the interest of the United States, whatever it may have been, in everything connected with the soil, in everything forming any portion of its bed or fixed to its surface, in everything which is embraced within the signification of the term land; and that term, says Blackstone, 'includes 'not only the surface of the earth, but everything 'under it or over it. And therefore,' he continues, 'if a man grants all his lands, he grants 'thereby all his his mines of metal, and other 'fossils, his woods, his waters, and his houses, as 'well as his fields and meadows.' (*Bl. Com.*, Book II, 19.) From the operation of conveyances of this nature, by individuals, the minerals of gold and silver are not reserved *unless by express terms.* They pass with the transfer of the soil in which they are contained."

A QUITCLAIM DEED IS AS EFFECTUAL TO PASS EVERYTHING BELOW THE SURFACE AND EXTENDING TO THE CENTER OF THE EARTH AS A GRANT, BARGAIN AND SALE DEED.

In *Moelle* vs. *Sherwood*, 148 U. S., 21-29, the Court said:

> "In many parts of the country a quit claim or simple conveyance of the grantor's interest is the common form in which the transfer of real estate is made. A deed in that form is, in such cases, as effectual to divest and transfer a complete title as any other form of conveyance. THERE IS IN THIS COUNTRY NO DIFFERENCE IN THEIR EFFICACY AND OPERATIVE FORCE BETWEEN CONVEYANCE IN THE FORM OF A RELEASE AND A QUIT CLAIM AND THOSE IN THE FORM OF GRANT, BARGAIN AND SALE. If the grantor in either case at the time of the execution of this deed possesses *any claim to or interest in* the property it passes to the grantee. In the one case, that of bargain and sale, he impliedly asserts the possession of a claim to or interest in the property, for it is the property itself which he sells and undertakes to convey. In the other case, that of quitclaim, the grantor affirms nothing as to the ownership, and undertakes only a release of any claim to or interest in the premises which he may possess without asserting the ownership of either."

In *Carpenter* vs. *Williamson*, 25 Cal., 154, it is said that "An ordinary quitclaim deed in this State

"is sufficient to pass any estate of the grantor as at "the time of the execution of the deed."

In *Graft* vs. *Middleton*, 43 Cal., 341, it is said:

> "In this State from the earliest time quitclaim deeds have been in every day use for the purpose of transferring title to lands, and have been considered as effectual for that purpose as deeds of bargain and sale. It is true they transfer only such interest as the seller then has, and don't purport to convey the property in fee simple absolute so as to pass an after acquired title, but to the extent the seller has an interest they divest him of it and vest it in the purchaser."

AS TO THE LOCATION OF THE PREMISES IN THE DEED DESCRIBED.

No proof is required in this case to locate the premises described in the deed on the surface of the earth for the reason that the *complaint* locates them, as the premises *east of and adjoining* the Summit Quartz Mine. (For the map of the Summit Quartz Mine as described in complaint and patent see between pages 12 and 13 and between pages 110 and 111 Trans.)

The complaint states that plaintiff is "the owner "in fee and in the actual, exclusive, notorious and "adverse possession of that certain mine and min-"ing ground commonly known as the Summit

"Quartz Mine situated in Sutter Creek Mining "District," etc. (fol. 6).

The plaintiff then proceeds to delineate the boundaries of the aforesaid Summit Quartz Mine as follows:

"Beginning at a post marked 42 and 48 situate "on the boundary between the Amador Quartz "Mine and the Summit Quartz Mine, then North "79° 35′ East 4 chains 68′ to a post" etc., following the boundaries of the Summit Quartz Mine as located on the diagram annexed to the complaint, and the description ending thus, "CONTAINING 15.50 "ACRES and embracing 1165.56 linear feet of the "Summit Quartz Lode or vein." This is the end of the description of the Summit Quartz Mine," in the complaint. This is as the plaintiff understood it and we understood it when the pleadings were filed. If the exigencies of the trial compelled plaintiff to claim that this description is untrue they should have changed their pleadings to correspond with their facts. But in face of the fact that no evidence was offered changing the location of its mine as portrayed in the diagram attached to the complaint, and no change has been made in the pleadings; and, as in our answer we have joined issue with him according to those allegations, and have admitted that the East line of the mining patent and the West line of the agricultural patent under which defendants hold are the same, it is too late now to

claim that the deed given to the Tomans does not cover the premises lying next adjacent to the East line of the Summit Quartz Mine, and that that line is not in the place and not limited by the boundaries given in the complaint. Not only have the pleadings admitted the boundaries of the Summit Quartz Mine but the complaint further alleges "that within this "said Summit Quartz Mine is a certain vein * * * "carrying gold and other valuable minerals." That this vein "on its downward course, crosses the line IN "THE FOREGOING DESCRIPTION, of the *exterior bound-* "*aries* of the Summit Quartz Mine, and on said "downward course passes outside of a plane drawn "down vertically THROUGH THE EAST SIDE LINE OF "SAID SUMMIT QUARTZ MINE, and enters the LAND "ADJOINING."

Said east line of said Summit Quartz Mine is set forth in the foregoing description of the exterior boundaries of said Summit Quartz Mine, as having a course *South 27 degrees and 15 minutes east and a length of 15.79 chains* (fols. 18-20), which corresponds with the west line of Toman's Ranch.

Furthermore, the findings find "That certain mine "and mining ground commonly known as the Sum- "mit Quartz Mine, situated in Sutter Creek Mining "District, State of California, is "bounded and de- "scribed as follows," and then follows a description of the Summit Quartz Mine in exactly the words of the complaint (see fols. 81 to 84 of the findings).

The findings have established that "the said vein, "lode or ledge in its downward course descends into "the earth at an angle approximately of 65 degrees "eastwardly, and on such downward course passes "outside of a plane drawn down vertically *through "the east side line* of said Summit Quartz Mine, and "enters the *land adjoining* at a depth of 1094 feet "from the collar of the shaft and on said downward "course, and at said depth it reaches, enters, pene-"trates and extends into and underlies the premises "known as the Toman Ranch" (fols. 94-98).

Inasmuch, then, as the words of the deed conveyed all "that part of Section 8 which lies north of the "Ione and Volcano Road and east of and adjoining "the Summit Quartz Mine", it is difficult to comprehend why the deed did not convey to the Tomans the title to the mineral in Section 8, which lay to the east of the east boundary line of the patented Summit Quartz Mine, assuming that prior to date of deed plaintiffs had any rights over the line.

In fact, as the complaint located the land described in the deed verbatim in the answer (fols. 61 to 75), and as no denial of the execution and delivery of the deed was made, under Section 448, *C. C. P.*, we were entitled to judgment upon the record upon the trial. A motion for a non-suit was made (fols. 344 *et seq.*) That motion was denied, to which defendant excepted (fols. 351 to 358).

The trial proceeded, the deed was offered in evidence, but after reading it the Court excluded the deed and decided that plaintiff was entitled to a decree.

And, notwithstanding this deed, the "defendants "were forever forbid, enjoined and debarred from "asserting any claim or interest in any vein, lode or "ledge now being worked by the plaintiff and de-"scribed in the complaint and the decision herein, "in *any part* of its *downward course.*"

That means within the premises deeded to defendants Tomans as described in the Findings. And also "from "interfering with the plaintiff, its servants, "agents and employees in extracting the ore in any "of said veins, lodes or ledges," etc. (see the Findings), and are "enjoined and forbidden to assert any "claim to the ore extracted from any of said veins, "lodes or ledges, or from asserting any claim to the "proceeds taken from any vein, lode or ledge", notwithstanding the complaint shows that the vein entered premises which plaintiff had conveyed to Tomans. Why this deed did not convey to us the mineral is the puzzle referred to this Court.

Counsel below made a learned and elaborate argument to show the nature and extent of their extra-lateral rights in the land they had conveyed to us, but we do not think it important to consider whether the Central Eureka Mining Company derived its interest, if any it had, in the land conveyed to the Tomans,

through various titles, or one, or whether it acquired the land through patents or deeds conveying the premises to it in horizontal layers or vertical slices, whether from a private person or the U. S. Government.

If plaintiffs desired to save out of the deed a horizontal layer of mineral 2000 feet, or any distance below the surface, they should have made that bargain and have inserted that exception in the deed. It is too late to put it in now. They cannot now in this action change the contract nor reform the deed, nor alter nor take from the description of the premises.

The deed shows that they desired as well to release some contracts they had with the grantees; this is no doubt true; but this does not prove that the operation of the deed was to be restricted to such releases and we see no evidence that the deed was to have any restricted effect. On the contrary, it is clear that plaintiffs intended to convey the title to the Tomans and to convey it "clear of all incumbrances", as they mention in their resolution to do so. The extralateral right was either land itself or an incumbrance on the premises described in their deed to Tomans, and this extralateral right passed to the Tomans not only by the deed but in accordance with the agreement of the parties.

The Court says (fol. 445): "Now this deed does "not upon its face purport to convey any portion of "the mining ground of the Central Eureka Mining

"Company. It purpots to convey by quitclaim deed "the lands described on the face of the deed which "lie East of the Central Eureka Mine or the Summit "Quartz Mine as patented. * * * There is noth- "ing in the deed that is not plain and clear. There "is nothing in the language of it that I can find that "is at all ambiguous which would entitle the Court "to admit outside evidence to explain its terms. Of "course that being so they could not be varied by "such evidence, and that being the case it seems to "me that the Court has no right to introduce in evi- "dence a paper, or permit it to be introduced into "evidence, that upon its face bears no relation to the "case at all—*to the property in controversy in this "case*" (fols. 446-447). Evidently the Court was looking for a conveyance of mineral in the deed and overlooked the fact that when plaintiff conveyed LAND he necessarily conveyed all the mineral in it and all his right, not only to the surface, but to everything lying East of the vertical plane which is the boundary of the piece granted on the West. If plaintiff had only an extralateral right to operate within that territory it necessarily passed by the deed whether you call plaintiff's right, "land" or "an easement," or "incumbrance" upon Toman's title.

JUDGMENT SHOULD BE ORDERED FOR DEFENDANTS.

DEED.

This case is on review before this Court on an appeal from the judgment.

The deed from the Central Eureka Mining Company to the Tomans, under which defendant's claim is set out in full in the answer (fols. 63 to 76).

Its execution was never denied by plaintiff, as required by Sec. 488 of the *Code of Civil Procedure*, and is, therefore, admitted by the pleadings.

That the execution and delivery were admitted on the trial is evident for the Court finds "The deed "dated December 31st, 1898, and set out in *haec "verba* in the respective answers of the defendants "herein, does not include any portion of said mine, "etc." This finding conclusively assumes that the deed was made and delivered.

The objection to it was substantially that the premises described in it do not convey the mineral below and to the east of the east line of the Summit Quartz Mine.

If this Court concludes that this deed conveyed to the Tomans the portion of the vein underlying the land described in this deed, it would be conclusive of any controversy that could arise hereafter, and upon the findings we are entitled to have this Court order

that the judgment be reversed and judgment final be entered for defendants, quieting title of plaintiffs to the premises.

EXTRALATERAL RIGHTS.

If the Court should reach the conclusion that plaintiffs have no extralateral rights, that is the end of this controversy and the same result would follow.

All which is respectfully submitted,

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